No. 20,400

United States
COURT OF APPEALS
for the Ninth Circuit

JULIA L. BOSTON, TRUSTEE IN BANKRUPTCY,
Appellant,

v.

LUELLA V. GARDNER, BANKRUPT,
Appellee.

BRIEF OF APPELLEE

Appeal from the United States District Court
for the District of Oregon

HONORABLE WILLIAM G. EAST, Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Page

Cases

Texts

Statutes

Attorney General Opinions

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ADDITIONAL STATEMENT OF CASE

While schedules of bankrupt are extensive, this represented the obligations of three marriages, one of which was to Philip O. Severson, father of Philip A. Severson. Testimony was adduced to indicate that a very few of the present incumbrances besetting the bankrupt were upon behalf of this child, and there was a further indication by appropriate proof that the son was

presently living temporarily with the father, although the mother still maintains actual legal custody.

SUMMARY OF ARGUMENT

Trustee has very capably presented four issues which are facades of but one issue; did the mother bankrupt own the two decrees in her own right.

The answer is diametrically no, because Oregon and other law indicates that the custodial parent operates in a fiduciary relationship or trustee category, and the support payments always should be applied for the benefit of the child.

To hold these payments for the bankruptcy court would violate the purpose for which the payments were ordered, punish the minor for the financial pyramid of not only both of its parents, but also of subsequent wives and husbands respectively who visited this potential farce of punishing a child for the problems of the parents.

Legally, the custodial parent cannot contract away the assets of the minor; and trustee has consistently sought to enforce by legal panacea to give life to a contract void as against public policy.

Further, the bankruptcy trustee takes no title to property which does not belong to the bankrupt and if any such property should come into the trustee's hands, it should be turned over to the rightful owner.

A trustee in bankruptcy takes property subject to

all valid claims, liens and equities and is not an innocent purchaser.

ARGUMENT

I

The custodial parent does not have ownership of support payment because monies due under the decree can be used only for the benefit of the children.

In case cited by Trustee, *Pavuk* v. *Sheetz,* 108 Ind. App. 494 at page 6 of her brief, the next sentence following trustee's quote is at page 501.

> "Such money as is paid by reason of the decree can only be used for the benefit of the children." See Stonehill v. Stonehill (1896), 146 Ind. 445, 45 N.E. 600; Hutchison v. Wood (1915), 59 Ind. App. 537, 540, 109 N.E. 794.

Thereafter, the trustee quoted, on page 7 of her brief, from the same case, *Pavuk, supra.* The next sentence thereafter holds at page 500.

> "This case, however, does not purport to hold that the unpaid installments of support money constitute a debt due from the father to the child's custodian and recoverable by such custodian regardless of what the facts may be in connection with the support and maintenance of the child." p. 500.
>
> "Appellee, although awarded the custody of the children has no proprietory interest in the amounts ordered for their support." at page 501.
>
> "Where an award is made in favor of a wife for permanent alimony in a final decree, to be paid to her for the support and maintenance of their mi-

nor child who is in the wife's custody, upon the receipt of each payment she should use the same solely for the benefit of the child. In the receipt and use of such money, she acts as a trustee or guardian of the minor child. Such judgments are enforceable in the name of the mother for the benefit of the child." Code 30-208, Jackson v. Jackson, 204 Ga. 259 (49 S.E. 662); *Thomas* v. *Holt,* 209 Ga. 133, 134, 70 S.E.2d 595.

"5. When alimony is awarded for the support of minor children, the mother acquires no interest in the funds, and when they are paid to her and she is a mere trustee charged with the duty of seeing that they are applied solely for the benefit of the alimony and ordinarily her conduct can not relieve the father of paying the same as directed by the court." Brown v. Brown, 210 Ga. 233 (78 S.E. 2d 516); Varble v. Hughes, — Ga. 29 (52 S.E.2d 303); Glase v. Strength, 186 Ga. 613 (— S.E. 721); Stewart v. Stewart, 217 Ga. 509, 123 S.E.2d 509.

"3. Appellee, although awarded the custody of the children, has no proprietary rights in the amounts ordered paid for their support. Decrees of this class do not create the relationship of debtor and creditor between the father and the party to whom the custody of the children is given. Such money as is paid by reason of the decree can only be used for the benefit of the children." See Stonehill v. Stonehill (1896), 146 Ind. 445, 45 N.E. 600; Hutchinson v. Wood (1915), 59 Ind. App. 537, 540, 109 N.E. 794. Pavuk v. Scheetz, 108 Ind. App. 494, 501.

"A wife awarded the custody of children, has no proprietary rights in the amounts ordered to be

paid for their support, and the money paid in the decree can be used only for the benefit of the children." 27 (B)—CJS, Divorce, 321 (2).

As provided in ORS 107.420 the custodian is actually accountable to the court for the disbursement of monies received under a decree:

ORS 107.420

"Accounting by custodian of children for support of such children. Whenever a court, in a proceeding for divorce, annulment or separation from bed and board, either before or after decree, awards to a party having the care and custody of minor children money for the support of such children, the court may in its discretion require an accounting from the custodian of the children with reference to the use of the money."

In conclusion, it positively must appear that the custodial parent had no effective personal right in the decree or monies paid thereunder, such as to be transferrable or accruable in such a manner or to be available for trustee's use against defrayment of all of bankrupt mother's bills.

ARGUMENT

II

Bankruptcy trustee takes no title to the property which does not belong to the bankrupt; and trust property should be turned over to its rightful owner.

Child support and alimony are not synonymous terms and even if in certain states the former is in-

cluded within the latter, still the custodian acquires no proprietary interest therein.

> "5. When alimony is awarded for the support of minor children, the mother acquires no interest in the funds, and when they are paid to her and she is a mere trustee charged with the duty of seeing that they are applied solely for the benefit of the children. She can not consent to a reduction or remission of the alimony and ordinarily her conduct can not relieve the father of paying the same as directed by the court." Brown v. Brown, 210 Ga. 233 (78 S.E. 2d 516); Varble v. Hughes, — Ga. 29 (52 S.E.2d 303); Glaze v. Strength, 186 Ga. 613 (— S.E. 721); Stewart v. Stewart, 217 Ga. 509, supra.

As stated by Judge East in his opinion:

> "An examination of the other cases indicates clearly that 'alimony' is not a word of art but that its meaning varies in changing contents, usually statutory. Bennett v. Bennet, 208 Or. 524, 302 P.2d 1019 (1956); Nelson v. Nelson, 181 Or. 494, 182 P.2d 416 (1947); Cogswell v. Cogswell, 178 Or. 417, 167 P.2d 324 (1946)."

Certainly there can be no contention that the support monies would be subject to garnishment for custodian's debt. Which is certainly the position that trustee occupies when they seek to apply past due and delinquent support obligation in payment of all of custodian's bills by allowing the trustee to assume jurisdiction over said funds for the benefit of the general creditors.

The custodian's right of action as involved here does not fit with 70 (5) * * * property, including rights of action, which prior to the filing of petition, he (bankrupt) could have by any means transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered:

> "Iowa 1941. A bankruptcy trustee takes no title to property which did not belong to the bankrupt although he may have been in possession thereof." Simmermaker v. Intl. Harvesting Co., 298 N.W. 911, 230 Iowa 519. 8 C.J.S. Bankruptcy R. 621, Para. 169.
>
> "Kansas 1939. A trustee in bankruptcy is not an 'innocent purchaser' but takes bankrupt's property subject to all valid claims, liens and equities." *Wyatt* v. *Duncan,* 87 P.2d 233, 149 Kan. 244.

See also Colliers on Bankruptcy 7017 to the effect that where property held by the bankrupt is in the legal name of the bankrupt but held in trust for someone else, the assets should be turned over to the beneficiaries.

CONCLUSION: In this line of cases it is the petitioner's conclusion that the mother takes nothing of beneficial interest, taking the same only for the use and benefit of the ward, and not thereby creating a debtor, creditor relationship such as would cause the rest to pass to the trustee in bankruptcy as an asset of the bankruptcy estate.

ARGUMENT

III

The custodial parent acquires no proprietary interest in child support payments.

In Oregon a parent acquires no property rights in children's property. Att. Gen. Op. Or. 447 and 14 Att. Gen. Op. 287, cannot contract away his rights.

Practically all the other states that have ruled on this matter hold in a like manner. *Stewart and Stewart supra. Thomas* v. *Holt supra.*

> "A wife awarded the custody of children, has no proprietary right in the monies ordered to be paid for their support, and the money paid in the decree can be used only for the benefit of the children." 27 (B), CJS. Divorce 321 (2).

And again in answer to the *Pavuk* case a further development of the citation context reveals

> "Appellee, although awarded custody of the children has no proprietory rights in the amounts ordered for their support. Decrees of this class do not create the relationship of debtor and creditor between the father and the party to whom the custody is given. Such money can be used for the benefit of the children." P. 501, *Pavuk supra.*

Clearly as denoted previously, there is not sufficient ownership in the support payments ordered paid to the custodian to justify general transfer thereof in its entirety without more to the trustee in order to extinguish the general obligations of the parent. In substantiation

of the Oregon position, 14 Att. Gen. Op. 287 is quoted verbatim:

"A parent can not set off against a debt from him to a bank, the deposit of his minor child.

"To warrant a set-off the demands must be mutual and subsisting between the same parties, and must be due in the same capacity and the same right.

"A father has no title to the property of his minor child nor custody nor control of it.

July 18, 1929.

"Hon A. A. Schramm,

Superintendent of Banks.

"Dear Sir: In your letter of July 15 relative to the liquidation of the Astoria Savings Bank you ask my opinion as to the right of a parent to set off the deposit of his minor child against a debt by him to the bank, listing several circumstances under which this demand has been made, such as as where the parent has been given authority to draw on the account; where the money has been deposited by the parent for his child; where the child himself has made the deposit, etc.

"It is a principle of law that a father has no title to the property of his minor child nor custody or control of it. If an infant is the owner of property, a guardian must be appointed to manage such property, the father having the right to be preferred in the selection of the guardian. 20 R. C. L. 613.

"To warrant a set-off the demands must be mutual and subsisting between the same parties, and must be due in the same capacity and in the same right. 34 Cyc. 712-714.

" 'A claim against a guardian individually can not be used as a set-off or counterclaim in an action by him as a guardian, nor is a debt due to defendant as a guardian available as a set-off against a demand due by him individually.' 34 Cyc. 722.

"Section 118, chapter 207, General Laws of Oregon, 1925, the banking act, provides as follows:

" 'When any deposit shall be made by or in the name of any minor, the same shall be held for the exclusive right and benefit of such minor and free from the control or lien of all other persons, except creditors, and shall be paid, together with the interest thereon, to the person in whose name the deposit shall have been made, and the receipt or acquittance of such minor shall be valid and sufficient release and discharge to such bank or trust company for such deposit or any part thereof.'

"In this section our Legislature has recognized the general principle of law that the parent does not have title to his minor child's property. Any interest which the parent might have in such property would be as guardian. The parent can not set off against a debt from him to the bank a deposit in the bank other than one which he owns in his individual right, and, therefore, has no right to set off his minor child's deposit against his debt to the bank irrespective of how the deposit was made for the child.

I. H. VAN WINKLE,
Attorney-General,

By Miles H. McKay, Assistant."

ARGUMENT

IV

The Court was correct in ruling that the custodial parent, as either a trustee or a guardian, albeit natural, lacks ownership for bankruptcy purpose of the choses in action involved here. Those choses could neither survive her nor be transferred by her, nor be levied upon, seized, impounded or sequestered in a proceeding against her in her personal capacity.

In Oregon the parent cannot properly with proceeding to obtain appropriate appointment and approval release a child's personal injury claim. *Ohio Casualty Insurance Co.* v. *Mallison,* 223 Or. 406, 354 P.2d 800 (1960). Additionally, this case sets out the parent as a fiduciary such that a conflict of interest might evolve from the parent dealing in a self-serving capacity.

One attorney general's opinions verify the inability of the parent to control the title and custody and control of the minor's property. 14 Att. Gen. Op. 287, 17 Att. Gen. Op. 447, and the latter is quoted here with regards to the pertinent portion:

> "In re legal liability of a city or of a municipal boxing and wrestling commission in case of injury to a contestant.
>
> "The parent of a minor contestant has no authority to waive, release or compromise a claim by or against such minor.
>
> "When it is mandatory upon a city or town to appoint a municipal boxing and wrestling commission.

July 27, 1935.

"To the Advisory Board of the Boxing and Wrestling Commissions, consisting of the Governor, Secretary of State and Attorney-General.

"Gentlemen: By chapter 290, Oregon Laws 1935, amending sections 56-2901, 56-2903, and 56-2908, Oregon Code 1930, relating to the creating of boxing commissions, their appointment and duties, and to the state advisory board, it is provided that the city attorneys of the respective cities and towns shall have the power to present to the state advisory board such questions as may be deemed necessary for the consideration of the board which shall have the sole discretion in passing upon such questions.

"Inquiry has been made by a city attorney of a city of this state on the following questions:

"1. 'What is the legal liability of the Commission or the City in case of injury to a contestant if he has been given the physical examination required by statute before entering the contest?'

"2. 'If the parents of a minor contestant sign a waiver for him, is this sufficient to relieve the Commission or City from liability for injuries to the minor contestant?'

"3. 'If a petition containing the names of fifty taxpayers or citizens is presented to the Mayor and Council, is it compulsory for the Mayor and Council to appoint a Boxing Commission?'

"Where a minor child is injured by the wrongful act or omission of another, the parent has a right of

action for loss of services of the child and other pecuniary damages sustained by him in consequences of such injury.

46 C. J., section 102, page 1294.

"A parent who consents to the employment of his child in dangerous service assumes the risks incident to the service, in so far as the liability to the parent is concerned, whether the character of the risks is known to him or not, and is not entitled to recover if the child is injured in the service, provided, the employer or, in this instance, the city, town, commission, officer or employee, or either, are free from any negligence.

46 C. J. 1298.

"An agreement by a parent to hold an employer or exhibitor harmless from injury to the child due to the employer's or exhibitor's negligence is void as against public policy.

46 C. J. 1298."

As to the ownership of custodial parent and her power to execute a contract in regard to child support the following are quoted:

"Where an award is made in favor of a wife for permanent alimony in a final decree, to be paid to her for the support and maintenance of their minor child who is in the wife's custody, upon the receipt of each payment, she should use the same SOLELY for the benefit of the child. In the receipt and use of such money, she acts as trustee or guardian of the minor child. Such judgments are enforceable in the name of the mother for the benefit of the child. *Jackson* v. *Jackson,* 20 Ga. 259, 49 S.E. 662; *Thomas* v. *Holt,* 209 Ga. 133, 134, 70 S.E.2d 595.

"3. Guardian of the property of wards are trustees, whose powers over the property of their cestuis que trust are defined by law, and among those pro pers is not to include the execution of a contract binding upon the estate of their wards. *Howard* v. *Cassells,* 105 Ga. 142, 31 S.E. 562, 70 Am. St. Rep. 44; *Lee* v. *Leibold,* 102 Colo. 408, 79 P.2d 1049, 116 A.L.R. 1319, *Thomas v. Holt, supra.*

"4. Where, as in the instant case, custody of minor child was given the mother, and the father required to make monthly payments of alimony to her for the support and maintenance of the child, the mother has no power to make A CONTRACT WITH AN ATTORNEY AT LAW WHEREBY SHE AGREES TO PAY HIM ONE HALF OF WHATEVER SUMS HE COLLECTS FROM THE FATHER BY VIRTUE OF THE DECREE. SUCH AN AGREEMENT BEING CONTRARY TO THE POLICY OF THE LAW, is void, and a court of equity will not aid the attorney in attempting to require the mother to account to him for payments she has received from the father since his employment under the alleged contract, or as to any future payments. *Thomas* v. *Holt, supra.*

"5. The contract of employment between plaintiff and defendant being void, the plaintiff has no lien or claim against any part of the money order or check in his hands, which represents a payment by the father as alimony for support and maintenance of the minor child." *Thomas* v. *Holt, supra.*

Trustee is saying that we should breathe some life into a void act and effectuate that which is against public policy. We point out that the obligation of support

is not dischargeable by reason of bankruptcy, and we do see no lucid reason why a child should be made victim of either the misfortunes or delinquencies of its parent. In this instance, there was testimony at the trial by the bankrupt that only a small portion of the creditors involved in her bankruptcy concerned the child involved here, Phillip Severson.

In answer to the repeated citation of *Pavuk* v. *Scheetz, supra,* we again repeat from said case:

> "Appellee, although awarded the custody of the children, has no proprietary rights in the amounts ordered paid for their support. Decrees of this class do not create the relationship of debtor and creditor between the father and the party to whom the custody of the children is given. Such money as is paid by reason of the decree can only be used for the benefit of the children."

The monies involved here apply as a result of garnishment out of the divorce. The case repeatedly cited by counsel for trustee failed because of the failure of such proof. In any event such specification was not available at the time of the hearing nor thereafter, and the cases distinctly hold that support payments are received by the custodial parent as a fiduciary, and would have to be applied for the benefit of the child.

As stated by Judge East, commencing at the bottom of page 4, of his opinion:

> "Two facets of the *Casey* decision were given particular emphasis by the referee. First, he relied heavily upon the court's discussion of 'alimony' as including child support payments. However, the ref-

bankruptcy purposes of the choses in action involved here. Those choses could neither survive her nor be transferred by her, nor be levied upon, seized, impounded or sequestered in a proceeding against her in her personal capacity.

"Accordingly, the decision of the referee must be reversed and the cause remanded for proceedings not inconsistent herewith.

"DATED June 30, 1965."

CONCLUSION

Legally and equitably this matter should be resolved by reserving to the child the delinquent support payments and thus not making him the donor of a judgment entered for his express benefit, to creditors of three marriages.

The obligation of support is not dischargeable in bankruptcy and we cannot but conclude that all support payments should be reserved for their intended beneficiary, particularly in a State wherein the custodial parent occupies a fiduciary capacity and is subject to an actual accounting to the court for the disbursement of these funds.

This would reflect legislative intention that all of the funds received, no matter at what time, be expended beneficially for the child or children involved.

Respectfully, submitted,

ROBERT L. OLSON
Attorney for Appellee

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT L. OLSON
Attorney for Appellee